

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH D. HORNE,

No. C 07-04592 SBA (PR)

Petitioner,

**ORDER DENYING MOTION FOR  
EVIDENTIARY HEARING**

v.

ROBERT HOREL, Warden,

(Docket no. 25)

Respondent.

Petitioner requests an evidentiary hearing in this action.

Under the AEDPA express limitations are imposed on the power of a federal court to grant an evidentiary hearing. The habeas statute provides that a district court may not hold an evidentiary hearing on a claim for which the petitioner failed to develop a factual basis in state court unless petitioner shows that: (1) the claim relies either on (a) a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review, or (b) a factual predicate that could not have been previously discovered through the exercise of due diligence, and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

Even if an evidentiary hearing is permitted because a prisoner was able to clear the hurdle posed by § 2254(e)(2), one is not required. Downs v. Hoyt, 232 F.3d 1031, 1041 (9th Cir. 2000).

1 The district court retains discretion whether to hold an evidentiary hearing or to expand the record  
2 with discovery and documentary evidence instead. Williams v. Woodford, 384 F.3d 567, 590 (9th  
3 Cir. 2004). This permissible intermediate step may avoid the necessity of an expensive and time  
4 consuming hearing in every habeas corpus case. Id. at 590-91.

5 Here, as a threshold matter, Petitioner has not alleged why he is entitled to an evidentiary  
6 hearing under § 2254(e)(2). He does not assert that his claim relies on a new rule of constitutional  
7 law that the Supreme Court has made retroactive to cases on collateral review, nor does he allege  
8 that the factual predicate of his claim could not have been previously discovered through the  
9 exercise of due diligence. Moreover, it is not clear to the Court that the facts which Petitioner seeks  
10 to develop could not be gathered other than by way of an evidentiary hearing, through the use of  
11 discovery and supplementation of the record. See Downs, 232 F.3d at 1041. Accordingly, the  
12 request for an evidentiary hearing is DENIED without prejudice as premature. This denial is  
13 without prejudice to the Court's sua sponte reconsideration should the Court find an evidentiary  
14 hearing necessary following consideration of the merits of Petitioner's claims.

15 This Order terminates Docket no. 25.

16 IT IS SO ORDERED.

17 Dated: September 30, 2009

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19 SAUNDRA BROWN ARMSTRONG  
20 UNITED STATES DISTRICT JUDGE  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 JOSEPH D. HORNE,  
5 Plaintiff,

Case Number: CV07-04592 SBA

**CERTIFICATE OF SERVICE**

6 v.

7 ROBERT HOREL et al,  
8 Defendant.

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
10 Court, Northern District of California.

11 That on October 5, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 Joseph Deonn Horne V-84328  
16 Kern Valley State Prison  
17 P.O. Box 5102  
18 Delano, CA 93216

19 Dated: October 5, 2009

Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk